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In the Supreme Court of the United States

OCTOBER TERM, 1963.

No. 474

PAUL LAMONGE,
Petitioner,

vs.

THE STATE OF OHIO,
Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF OHIO.

BRIEF FOR THE STATE OF OHIO IN OPPOSITION.

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Warren, Ohio.

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OPINIONS BELOW.

There is no opinion of the trial court in this case, the opinion of the Court of Appeals for the Fourth Judicial District, sitting by special assignment in the Seventh Judicial District, and included in Petitioner's brief has been reported at 117 O. A. 143, 23 O. O. 2d 314.

JURISDICTION.

The jurisdiction of this Court is not properly invoked with respect to Point Four of the petition, for the reason that the question presented therein was not raised in the State courts.

STATEMENT OF FACTS.

A full understanding of this case necessitates a review of the history of the Warren Sewer Improvement Project, particularly what are known as Phases B and C. Phase B consists generally of the construction of a sewer to collect storm water and deposit it in the Mahoning River, thus diverting the same out of the Warren Sanitary Sewer System. Phase C involves the construction of a sewer generally following the path of the Mahoning River. The purpose of this line is to intercept existing sewer lines and collect the sewage presently dumped raw into the Mahoning River by such existing lines, and carry the sewage to a new sewage treatment plant. The cost of these phases of the project is in excess of Four Million Dollars.

The engineering firm of Havens and Emerson, Cleveland, Ohio, was employed by the City of Warren, to conduct the necessary surveys and to draw the plans and specifications and estimates for this project. In May, 1960, after the engineering survey had been completed, the City Council of Warren passed an ordinance authorizing the Safety Service Director to advertise for bids for Phases B and C of the sewer improvement project. The ordinance passed contained no authority for the Board of Control, *i.e.*, the Mayor and the Safety Service Director, to award a contract on the basis of the bids, nor did it contain any of the necessary fiscal authority to finance the project. It is to be noted that the City Council of Warren employed this tripartite legislative technique throughout the period in which the project was to be let. The authority for advertising for bids, the authority for awarding the contract, and the fiscal legislation were each handled by a separate ordinance. The net effect of this scheme was to give the Council control over the contract at three different levels.

First bids were received and opened on August 1, 1960, but subsequent thereto Council passed no ordinance authorizing the Board of Control to enter into a contract with the low bidders. Instead a second advertisement for bids was authorized. These bids were received on October 7, 1960. Again, Council failed to pass the necessary ordinance authorizing the Board of Control to award a contract. Bids were received for the third time on March 16, 1961, at which time the Rocco Ferrera Company and the Boam Company of Lavonia, Michigan, bidding together in a joint venture, were low bidders on Phase B of the project; and the Al Monzo Construction Co. of Monroeville, Pennsylvania, was low bidder on Phase C of the project. At this letting, contractors had been invited to submit both separate bids on each phase of the project and combined bids on both phases. The low bid on a combined bid for both phases had been submitted by the Boam-Ferrera Companies, and Havens and Emerson recommended to the City that it accept this combined bid as the lowest and best bid for both phases, even though total dollar cost of this combined bid was slightly in excess of the total of the Ferrera-Boam bid on Phase B and the Monzo bid on Phase C.

On May 5, 1961, the City Council passed an ordinance authorizing the Board of Control to enter into a contract with the Ferrera-Boam Companies on both phases of the project. On July 6, 1961, contract was signed between the City and the Ferrera-Boam Companies for the construction of Phases B and C.

With this broad outline of the legislative history and the project in mind, it is now necessary to return and trace the activities of Raymond Little and other members of the Warren City Council during the bidding of the project. Their activities provide the necessary background

for the entry of the defendant-appellant into the picture and his actions which form the basis for his conviction on the counts of threatening to kill Eugene Brady to extort money and obtaining money by false pretenses. In the summer of 1960, three members of the Warren City Council, Raymond Little, John Janosik and Jack Flask initiated a series of meetings with officials of the Ferrera-Boam Companies whom they knew to be interested in bidding on the Warren Sewer Improvement Project, as a joint venture. Officials of the Ferrera Company included its president, Rocco Ferrera, and Al Cicchini, Vice President and Secretary; officials of the Boam Company included Pat Brady and his son Eugene Brady, its Secretary and Treasurer. Negotiations on behalf of the Boam Company were carried on by Eugene Brady, and on behalf of the Ferrera Company by both Mr. Ferrera and Mr. Cicchini. From the outset, the three councilmen made it clear to the officials of the Boam and Ferrera Companies that they were interested, by various corrupt ways and means, in receiving illegal benefits from the Warren Sewer Improvement Project. Meetings took place in various cities and ways and means were discussed in general terms, whereby the councilmen could make money from the project. Possible techniques discussed included direct payments by the contractors upon the award of the contract; the eventual addition of nonexistent "extras," (a scheme to be consummated by the device of employing a resident engineer who would recommend certain changes in the basic contract involving the expenditure of additional money, and then certifying that such "extras" had been put into the job when in fact they had not); commissions on materials, etc.

By mid April, 1961, no specific agreements had been reached between the officials of the Boam-Ferrera Com-

panies as to the ways and means or amounts to be involved in the various forms of illegal payments to the councilmen. The situation in mid April was then as follows: From the point of view of the legislation, bids had been let for the third time, but the necessary second and third steps of authorizing the Board of Control to award the contract and providing financing had not been taken. The contract had, of course, not been signed. Negotiations as previously stated between the councilmen and the contractors had not yet resulted in any specific agreements. It is at this point that Frank Cickelli, Trumbull County Democrat Party Chairman, entered the picture. After a preliminary meeting between the officials of the Boam-Ferrera Companies and Mr. Cickelli in Cleveland in mid April arrangements were made for a meeting to be held on May 7, 1961. This meeting took place at the home of Frank Cickelli. The initial portion of the meeting was concerned with the negotiation of an exact figure to be paid by the contractors in return for their being awarded the contract. It was finally agreed that the sum of $35,-000.00 would be paid to both Cickelli and Little jointly. Following this there were further discussions at the meeting involving other ways and means for getting money into the hands of Cickelli and the councilmen. These conversations concerned the techniques to be used in putting fictional "extras" on the job.

It was also at this meeting that Cickelli first indicated that he would take care of contract matters as far as the Mayor of the City of Warren, Walter Pestrak, was concerned. This was a representation which both he and the defendant were to make on several other occasions.

Two weeks later another meeting was held in Warren between Brady, Cicchini and Cickelli at Cickelli's home. The primary purpose of this meeting was for the con-

tractors to meet the defendant, Paul Lamonge. The defendant was introduced by Cickelli as a trucker, and Cickelli requested that the contractors hire him on the job. After the defendant left, Cickelli pointed out to the contractors that Lamonge could be used in the scheme to effect the payoff. He suggested that with Lamonge doing the trucking, Lamonge could present false bills and be paid by the contractors for jobs not actually performed. The purpose of this plan was to get illegal monies to be paid to Cickelli and others out of the companies without a tax being paid thereon. Mr. Little also came to the Cickelli home during this meeting and inquired if the $35,000.00 agreement was still in effect, and was assured that it was.

Meanwhile City Council had passed the necessary legislation; the Board of Control had awarded the contract to the Boam-Ferrera Companies; and finally in July the City of Warren entered into a written contract with the Boam-Ferrera Companies for the construction of phases B and C of the Sewer Improvement Project. In the latter part of July, 1961, Al Cicchini who was to be field manager on the job, moved to Warren to set up his office and make preparations for the beginning of work. During the first couple of weeks in town he was frequently contacted by Cickelli. Cicchini and Cickelli had dinner and meetings together at which Mr. Cickelli again assured Cicchini that he represented the Mayor. At one of these meetings in the latter part of July, Cicchini asked Cickelli to have Paul Lamonge drop around the company office to discuss trucking. Lamonge appeared at the Boam-Ferrera Companies' office on the afternoon of August 2, 1961. At this time the defendant indicated to the contractors that he wished to have control of all subcontracting and material purchases, but the contractors stated that they had no such understanding of Lamonge's role in the project.

Defendant immediately placed a call to Frank Cickelli suggesting another meeting with Cicchini and Brady to straighten out the matter. This meeting was held at the Chateau Restaurant in Warren, and after dinner Cickelli advised the contractors that he had to make a speech in Vienna, Ohio. He requested the contractors drive him there so that they could discuss business on the way. On the way to Vienna the defendant insisted that Cickelli make clear to the contractors what his position was to be on the job. Finally Cickelli told the defendant that he was to work hand-in-hand with Cicchini, do everything for him and buy everything for him.

When they reached Vienna, the discussion turned to the $35,000.00 previously agreed upon at the May 7th meeting. The contractors mentioned having seen Mr. Little, and Cickelli advised them that Little was not to get any of the money and that instead the contractors were to pay the $35,000.00 to the defendant Paul Lamonge and nobody else. The contractors objected that this was not the original arrangement, but Cickelli reiterated that Lamonge was to get the money or else someone would get hurt.

Following this, work began on the job in earnest, but under the increasing pressure and control of the defendant, Paul Lamonge, who began to appear on the job daily, suggesting a series of schemes to get control over the purchase of material and the letting of subcontracts. He demanded to know of the contractors the prices of material bids from potential suppliers, so that before the contracts could be awarded for material or work, he could extract "contributions" from the subcontractors and suppliers.

Cickelli meanwhile continued to meet with Cicchini, with two matters of importance being discussed. The first of these was the arrangement for a down-payment on the

$35,000.00. It was agreed that the contractors would make a down-payment of $10,000 in cash. The second topic of discussion concerned the ways and means by which the balance of the money could be paid, the problem being the one which had existed from the beginning—of getting a large sum of money in and out of the companies without an undue tax burden. It was finally suggested at a meeting between Cickelli, Cicchini, Lamonge and Brady that a sales commission could be paid on the sale of material; the obvious source was the sale of the concrete pipe, as the job called for over one million dollars worth of this material. It was pointed out that an arrangement could be made to have a sales commission paid by the company supplying the pipe to a firm of Mr. Cickelli's choosing so that he could get the money. In accordance with this plan, Cickelli introduced Mr. Cicchini to an official of a company known as the M & W Sales Corporation and told Cicchini that the commission could be paid to them. The M & W Sales Corporation had nothing to do with the supplier, American Vitrified Pipe Company. Actually the contract had already been entered into sometime previously by Cicchini. However, this dummy arrangement was set up in order to enable the money to be paid to Cickelli in accordance with the agreement of May 7th. Through all these meetings in August Cickelli continued to indicate to Cicchini and Brady that he represented the Mayor. Meanwhile on his part the defendant also told the contractors that he and Cickelli would take care of matters as far as Mayor Walter Pestrak was concerned. Lamonge also requested of the contractors that he be introduced to Havens and Emerson's resident engineer, Howard Brown, for the purpose of getting a program of fictional "extras" started.

Though he had agreed, Cicchini was concerned by the

change in arrangement for the payment of the money originally scheduled to go to Little and Cickelli and now to be paid Lamonge. He therefore stalled the payment of any sum until the return from Europe of his company president, Rocco Ferrera. Upon Mr. Ferrera's return, a meeting was arranged between Cicchini, Ferrera and Cickelli. They met at Cickelli's house, and again Cickelli insisted that the money be paid to the defendant. In addition, there was a subsequent meeting at a local restaurant at which Cickelli again brought up the subject of subcontractors, saying that he wished to send subcontractors around and that if they would get contracts, contributions would be obtained from them in return for their getting the work.

Acting on the representations of Cickelli and the defendant that they represented Mayor Walter Pestrak, the contractors paid the sum of $5,000.00 to Paul Lamonge on August 22, at the field office of the Ferrera-Boam Construction Company, and on August 27th an additional $5,000.00 was given to the defendant in the Warner Hotel room of Cicchini.

To the contractors it now appeared that they had met $10,000.00 of their $35,000.00 obligation, and that the other $25,000.00 would be forthcoming from the sales commission to be paid to the M & W Company. The events of August 29th, however, showed that Cickelli and the defendant, Lamonge, had no intention of being satisfied with $35,000.00.

In order to explain the background of the events of August 29th, it must be remembered that at the third bid letting, Monzo Construction Company had been low bidder on Phase C. When the contract was awarded to Boam-Ferrera, Monzo Construction brought suit in order to force the City to set the contract aside, and award it the con-

tract for Phase C. As a result of this lawsuit, negotiations had been carried on between Al Monzo and Eugene Brady, with the view to subletting some of the work to Monzo as a means of settling the suit. Brady and Monzo discussed subletting approximately one million dollars worth of work on Phase C to Monzo, in return for which Monzo would drop his suit in Federal Court.

Having learned of these negotiations between Brady and Monzo, Lamonge came to the Ferrera offices in Warren on August 29th and demanded to know of Al Cicchini why he had not been informed of these subcontract negotiations claiming that he was to have control of the issuance and letting of all subcontracts, for the purpose of obtaining contributions from each and every subcontractor. Cicchini insisted that this was not the case and that the only thing that had been promised was that if Cickelli sent around subcontractors, they would be awarded the work, providing their bids were competitive. Lamonge continued to insist that he have control over all subcontracts, and heated arguments developed. After threatening Eugene Brady, Lamonge again suggested that Cickelli be contacted to confirm Lamonge's role on the job. Lamonge and the contractors went to the Cickelli home, but did not see Cickelli, and Lamonge showed a note to the contractors, stating it had been written by Cickelli. This note indicated that whatever Lamonge wanted should be done by the contractors. That evening the contractors refused to accept Lamonge's position that he control all the subcontracts. Lamonge and the contractors then parted company. The following noon Paul Lamonge came to the office of the Ferrera Company looking for Eugene Brady and brought with him four cars, which he stated were filled with his "boys" who were ready to take care of Gene Brady. Brady was not at the office, so Lamonge showed some of the cars with the men to Mike Ferrera, son of Rocco Ferrera, and

told the young boy it was lucky for Brady that he was not there.

When Cicchini and Brady returned from lunch, they received a report of this visit from Mike Ferrera, and almost simultaneously Lamonge returned to the office. He immediately made it clear that his intended purpose in coming to the office was to bring the contractors into line by threats of violence. He returned $5,000.00 to Brady and told him to get out of town within one hour or be killed. Turning to Cicchini, he advised him that he should also get out of town and his money would be returned later. In fear of their lives, the contractors made immediate preparations to leave Warren, which they did, and the project was shut down.

On September 18, 1961, the Trumbull County Grand Jury began its investigation into the stoppage of work on the Warren Sewer Improvement Project. Aware of the fact that the Grand Jury was investigating the work stoppage, Lamonge and Cickelli made a last ditch effort to save themselves. Fearing exposure of their illegal activities, they began to make a series of phone calls to Rocco Ferrera in an attempt to quiet the whole matter. Several phone calls were made by Lamonge, who attempted to convince Mr. Ferrera that he should return to work at once and that when Ferrera appeared before the Grand Jury, he should not reveal any of the illicit activities that had led to the work shutdown, but instead should attribute the work stoppage to "internal problems." On September 21st a phone call was made to Ferrera in Michigan. Cickelli talked with Mr. Ferrera and during the conversation asked Ferrera to forget everything that had been said, to reveal nothing of the payoffs or anything of Cickelli's or Lamonge's activities on the Sewer Project, and instead encouraged him to attribute the work stoppage to the fictional "internal problems."

The foregoing outline of facts was amply supported by the testimony of the prosecution witnesses and was only contradicted by the defendant who was a witness on his own behalf. In this testimony the defendant pictured himself simply as a trucker and a "public relations man" seeking to be helpful to all concerned. He characterized the events of August 29th and August 30th as a simple argument between himself and Gene Brady. Defendant acknowledged the receipt of $10,000.00 but claimed that $5,000.00 was a legitimate payment for his own services in protecting Al Cicchini from some vague dangers. As to the other $5,000.00, he claimed that this was paid to him by the contractors in an attempt to buy approval at City Hall for specification changes in the contract involving man-hole covers.

QUESTIONS PRESENTED.

(1) Was petitioner deprived of his rights under the 14th and 6th Amendments of the Constitution of the United States by any claimed irregularity in the selection of the grand jury when he failed to raise this issue in accordance with the applicable statutes and laws of the State of Ohio and when the record of this case is void of any evidence of alleged irregularity in the selection of the grand jury?

(2) Were petitioner's rights under the Fourteenth Amendment and 6th Amendment violated when the trial court removed the court and jury to the home of a witness for the State when the witness was shown to be unavailable for the trial because of illness and when the defendant was permitted to confront and cross examine such witness?

(3) Was the petitioner deprived of his rights under the 6th and 14th Amendments under the Constitution of the United States when the trial court permitted the

Prosecuting Attorney to cross examine the defendant on matters which might bear on his intent or provide a basis for impeachment of the defendant. And if such error was committed in this regard, was the error rendered harmless by the exculpatory answers of the defendant?

(4) Were the petitioner's rights under the 14th Amendment violated by an amendment to the indictment made in accordance with Ohio statutes and not changing the identity of the crime charged? Is petitioner entitled to raise this question in this court when the same has not been raised in the Ohio Courts?

ARGUMENT.

POINT I.

Petitioner was not deprived of his rights under the 14th Amendment to the Constitution of the United States because such amendment does not even require Grand Jury proceedings as a prerequisite to a criminal conviction in state courts. Even if Grand Jury proceedings did come within the purview of the 14th Amendment, the record of this case is devoid of any evidence of irregularity in the selection of the Grand Jury. Finally the issue of alleged irregularity was not properly raised in accordance with the operative Ohio statutes.

This Court has "consistently held that there is no federal constitutional impediment to dispensing entirely with the Grand Jury in State prescutions."[1] *Due process* of law as used in the 14th Amendment is concerned with the basic fairness of procedure on the trial of the ultimate

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[1] *Beck v. Washington*, 369 U. S. 541, 8 L. ed. 2d 98, 82 S. Ct. 955; *Ocampo v. United States*, 234 U. S. 91, 58 L. ed. 1231, 34 S. Ct. 712 (1914); *Lem Woon v. Oregon*, 229 U. S. 586, 57 L. ed. 1340, 33 S. Ct. 783 (1913).

issue of guilt or innocence in a criminal case and not with the particular accusatory method by which such issue is joined in State Courts.

Even if the 14th Amendment had application to the Grand Jury proceedings in a State case, the issues would still be that of basic fairness to the accused and not to the particular technicalities of procedure by the State in choosing a Grand Jury. It may be observed in this regard that the alleged irregularities as set out in the statutory sections cited in petitioner's brief pages 18, 19 and 20 are largely technical in nature and any possible violation of these statutes would not lead to impanelling of a grand jury which was either biased or which lacked the requisite qualifications to act as jurors. Nor is there even any claim by the defendant that such bias or lack of qualifications was present in this case.

Certainly any attempt to plead a violation of the 14th Amendment, in selection of a grand jury must be founded on some evidence of the irregularity of such selection. This evidence has never been submitted in this case. No evidence was presented in support of defendant's motion to dismiss the indictment for improper selection of the grand jury. There is nothing in the record to pass upon in this regard. Petitioner has attempted to incorporate by reference in his briefs in the Ohio Courts and in this Court matters raised in another case. Petitioner states on page 18 of his brief that a motion was sustained in the unreported case of *State of Ohio v. Little* to the array of the petit jury. There is no opinion delivered in this case and certainly no finding of a violation of all the statutes cited by the petitioner as seems to be implied in petitioner's brief. It is respectfully submitted that evidence of irregularities, if there were any, must appear in the record of this case if error is to be urged.

If this issue were not disposed of by the foregoing, the record of this case clearly shows that the petitioner did not comply with the laws of Ohio in the manner of raising objection to irregularities in the alleged impanelling of the grand jury.

Ohio Revised Code Section 2313.41 provides:

> "*A challenge of the array may be made* and the whole array set aside by the court *when the jury, grand or petit, was not selected*, drawn or summoned, or when the officer who executed the venire did not proceed *as prescribed by law*. No challenge to the array shall be made or the whole array set aside by the court, by reason of the misnomer of a juror; but on challenge, a juror may be set aside by reason of a misnomer in his name; *but such challenge shall only be made before the jury is impaneled and sworn*, and no indictment shall be quashed or verdict set aside for any such irregularity or misnomer, if the jurors who formed the same possessed the requisite qualifications to act as jurors."

There is no question as to the qualifications of the grand jurors that indicted this defendant. No challenge to the array of this panel of grand jurors was made. The Ohio code is very specific in stating, "no indictment shall be quashed or verdict set aside for any such irregularity or misnomer if the jurors who formed the same possessed the requisite qualifications to act as jurors."

Ohio Jurisprudence 2d discusses this matter in two places and states as follows:

15 O. J. 2d, 196:

> "The lack of legal qualifications of grand jurors may be taken advantage of by a plea in abatement. But mere irregularities in selecting and drawing grand jurors which do not relate to or affect their personal qualifi-

cations as such, must be taken advantage of, if at all, by challenge for cause, and not by a plea in abatement."

26 *O. J.* 2d 268:

"Technical defects and irregularities in the selecting, summoning and impaneling of a grand jury must, by express statutory provisions, be availed of, if at all, by challenge before the grand jury is impaneled and sworn."

A leading authority is the case of *State of Ohio v. Huling*, 17 O. S. 588, wherein the Court stated:

"Whether the latter kind of objection (objection to mere irregularities in the manner of selecting of grand jurors) can be taken by plea to the indictment, is a question upon which there has been much difference of opinion and contrariety of decision. Since the decision of the case of *Doyle v. the State*, 17 Ohio 222 it has been settled law in Ohio that such a plea is good in all cases where the objection is to the qualification or competency of the individual jurors. This is as far as we have gone. We have never had and such is not the practice so far as we know, that mere objections to the *manner* of selecting and constituting the jury can be taken by plea in abatement. On the contrary, the practice is to require the objection to be taken by challenge for cause, either to the panel or to individual jurors."

In the case of *The State of Ohio v. Blaney*, 17 O. C. C. 486 exception was taken to the indictment, first by a motion to quash and then by a plea in abatement which alleged defects and irregularities in selecting, drawing, summoning and impaneling the grand jury. The Court held:

"None of these things are of essence, and it is believed, unless they are, they cannot properly be made the basis of a motion to quash the indictment, or of a plea in abatement, but must, by express statutory provi-

sion, be availed of, if it all, by challenge before the jury is impaneled and sworn." (Sec. 5175 R. S. cited.)

A close reading of Section 5175 of the Revised Statutes discloses that it is with the exception of two or three minor words identical with Ohio Revised Code Section 2313.41. This rule was followed in the cases of *State v. Lindsey*, 4 O. C. C. N. S. 409, *State v. Dieter*, 81 O. S. 505, *State v. Lynch*, 5 O. S. 16 and *State v. Easter*, 30 O. S. 542.

In *State v. Roth*, 3 O. C. C. 59 on page 63 it is stated:

"In some of the States, challenge seems to be the only form in making the objection even where it goes to the personal disqualification of the jurors. The better opinion however is and the current of authority is to that effect that irregularities in selecting and impaneling grand juries which do not go to their incompetency can be only objected to by way of challenge but that their individual incompetency may be pleaded in abatement to the indictment."

This is, and has been the law of Ohio since 1848. The defendant in this case having failed to challenge the array as prescribed by statute and thereby obtain a new panel cannot now complain after conviction, of any alleged irregularities.

The second reason this assignment of error is not well taken is that even if alleged irregularities in the selection of the grand jury may be objected to other than by challenge to the array, it must be done by plea in abatement.

Ohio Revised Code Section 2941.55 provides:

"Plea in abatement may be made where there is a defect in the record shown by facts extrinsic thereto."

The rule is set out in 15 *O. J.* 2d 402 as follows:

"The lack of legal qualifications of grand juries may be taken advantage of by a plea in abatement."

It appears that if defendant had an alternate method available to him of objecting to these alleged irregularities, it is by plea in abatement.

Ohio Revised Code Section 2941.59 provides:

> "The accused waives all defects which may be excepted to by a motion to quash or a plea in abatement by demurring to an indictment, or by pleading in bar or the general issue."

In *State of Ohio v. Detterline*, 15 O.N.P., N.S. 433, it was held:

> "A plea of abatement must be made prior to the plea of not guilty, and where it is discovered during the taking of testimony that the prosecuting witnesses has been incorrectly named in the indictment it is too late to interpose a plea of abatement."

In this case the defendant entered his plea of not guilty on October 17, 1961, with leave until October 20, 1961 to file motions. It was not until January 31, 1962 that his motion, which is difficult to define, was filed. Having entered his not guilty plea, defendant, by reason of O. R. C. 2941.59 waived any objection to the impanelling of the grand jury.

Though appellee believes the proper method for objecting to the grand jury was by challenge as provided by O. R. C. 2313.41 if there were any other method of questioning the alleged irregularities of the grand jury, it should have done by plea in abatement and this must be done before the entry of the not guilty plea.

Ohio Revised Code Section 2941.08 (k) would also cure any possible defects complained of in respect to the grand jury.

Ohio Revised Code Section 2941.08 (k) provides:

> "An indictment or information is not made invalid, and the trial, judgment or other proceedings stayed,

> arrested or affected; for other defects or imperfections which do not tend to prejudice the substantial rights of the defendant upon the merits * * *."

Defendant has not questioned the qualifications of the grand jurors, does not allege that any single member of the grand jury was biased, partial, or otherwise an unsuitable person for jury service. The soundness of their indictment would seem to be substantiated by the conviction of the petit jury.

It is not clear from petitioner's brief whether he is also attempting to raise an issue of the violation of the Fifth Amendment to the Constitution of the United States, but if such be the case it is clear "That the Fifth Amendment does not take upon itself the local law as to how the grand jury should be made and raise the latter to a constitutional requirement.[1]

The Due Process of Law Clause in the 14th Amendment has also been held to even permit prosecutions by prosecutors information and not even require the states to indict by grand jury. In the case of *Lem Woon vs. The State of Oregon*, 229 U. S., 586, 57 L. Ed. 1340, where the defendant was prosecuted by information as prescribed by Oregon Law the holding of the United States Supreme Court was:

> "The information laws do not contravene the fourteenth amendment and deny due process of law as required by the fifth amendment of the United States Constitution."

The case cited by the defendant (p. 22 of his brief) is the case of the *United States of America vs. Hoffa*, 196 F. Supp. 25 (1961). In that case the defendant was indicted by a Federal Grand Jury which was selected in violation

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[1] In the matter of *George Moran*, 3 U. S., 51 L. Ed. 105, see also 24 *Amer. Jurisprudence*, page 833.

of the Federal Civil Rights Act of 1957. The case was heard upon the motions of the defendant before trial was even had and apparently before plea was even entered. There is no indication that all procedures for raising the question were not properly complied with and in pursuance to the motions filed, evidence was submitted to the Court which clearly disclosed the irregularities. In the case at bar the statutory procedures for raising the objection to the grand jury were not followed nor was there any evidence submitted of any irregularities.

POINT II.

Defendant's right to a public trial was not violated by removing the trial to the home of a witness who had become suddenly ill and was unavailable for testimony at the Court House when the court announced to the parties and spectators that the trial would be adjourned to the home of the witness and issued no order excluding anyone from the trial. Such adjournment was a matter of necessity and within the discretion of the trial court. The right to trial by an impartial jury was not violated because the bedroom of the witness was too small to admit the entire jury since such was a matter of necessity and within the discretion of the trial judge and the basic rights of confrontation and cross-examination were preserved.

Petitioner was charged and convicted on the third count of the indictment against him of obtaining $10,000.00 by false pretenses, to-wit: that he had falsely stated that he represented Mayor Walter Pestrak of the City of Warren in negotiations with officials of the Boam-Ferrera Company. It therefore became incumbent upon the state to prove the falsity of this representation by the testimony of Mr. Pestrak who was the only one who could

positively deny that the defendant acted in any representative capacity for him. Mr. Pestrak was taken suddenly ill after the commencement of the trial. Both his personal physician and a court appointed physician certified to the trial judge that requiring the presence of Mr. Pestrak in the court would involve a serious danger to his health. Since the Ohio Statutes[1] provide that "depositions to be used as evidence upon trial must be filed at least one day before the day of trial," the only possible method of obtaining this testimony was by removing the place of trial to the home of the witness.

It was conceded by both sides in the courts below that there was no Ohio law directly in point on the question of the propriety of this procedure. However, by its decision in sustaining the conviction in this case, the Supreme Court of Ohio has chosen to adopt the majority rule as set forth in 43 *A. L. R.* 1535:

> "In the majority of cases, and by what seems the better rule (unless prohibited by statute), it is held that the trial court may in its discretion adjourn court to the home or residence of a sick witness who, because of his illness, is unable to attend it at the court house, and there take his testimony; and that the validity of the proceedings is not affected thereby, provided there is no abuse of discretion, the parties are not put to substantial inconvenience, their rights prejudiced, etc."

There is of course no federal constitutional inhibition to Ohio adopting this procedure. The question then becomes whether under the circumstances there was any violation of due process of law under the 14th Amendment in the manner in which the trial was conducted at the home of the witness Walter Pestrak.

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[1] O. R. C. 2319.26.

The first contention of the petitioner in this regard is that the witness testified outside the presence of the jury. It may be conceded that because of the limitations of space, the jury was not in the same room as the witness and did not have the opportunity to observe him while he testified. Appellee does not agree however as stated in petitioner's argument that the jury was outside the hearing of the witness. Since the record does not indicate that the jury could not hear the testimony it must be presumed that the trial judge did not permit any meaningless charade of eliciting testimony from a witness who could not be heard by the tryers of fact. If indeed the jury could not hear the witness, one might wonder why counsel for the defendant indulged in such a lengthy cross examination.

It is respectfully submitted that the right of the defendant to have the jury observe witnesses while not to be dispensed with without cause is not an unqualified one. The most obvious analogy is that of the use of depositions in criminal cases which are permitted by State laws and held by this Court not to be a violation of the 14th Amendment.[1]

It is clear that the two primary rights afforded the defendant in a criminal case with respect to witnesses, i.e., confrontation and cross examination were both preserved to him. The defendant was in the room with the witness and defendant's counsel was permitted to and did cross examine the witness at great length.

Petitioner's second contention with respect to a violation of due process in the taking of Mr. Pestrak's testimony is concerned with an alleged exclusion of the public from this portion of this trial. Appellee does not agree with the statement contained in petitioner's brief that

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[1] *West v. Louisiana*, 194 U. S. 258, 48 L. ed. 965, 24 S. Ct. 650; *Harrison v. State*, 270 U. S. 632, 70 L. ed. 771, 46 S. Ct. 350.

there was any announcement that the general public would be excluded and finds no such announcement in the record of this case. In fact the record shows that the court announced the adjournment to the home of the witness in open court and while expressing doubt as to the number of members of the public who could be admitted because of space limitations implied that subject to such limitations the public would be admitted. The record contains no evidence or claim by counsel that anyone wishing to enter the home was in fact excluded and as a matter of fact members of the press were present. It might be conceded that the lack of space in the Pestrak home once the parties, counsel, jury, court and reporter had been admitted would place a limitation on the number of persons of the general public who could gain a vantage point for observing this particular part of the trial. While it may be conceded that the accused's right to a public trial would prohibit arbitrary exclusions of the entire general public from all portions of the trial, it has been recognized in many instances that particular circumstances would justify a trial judge in excluding some segments of the public for parts of the trial, for example, exclusion of spectators creating a disturbance, exclusion of such spectators whose presence would overcrowd the courtroom, exclusion of the public where the presence of spectators is necessary to prevent the embarassment or emotional disturbance of a witness particularly of one of immature years.[1] The common thread in the cases upholding the right to exclude portions of the public seems to be a showing of the necessity for such exclusion under the circumstances, plus the preservation of the overall public character of the trial by the admission of the public to

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[1] 48 ALR 2d, 1425 and annotations thereunder.

such parts of the trial as did not involve the reasons for partial exclusion.

In the instant case the only exclusion of the general public was caused by the medical necessity of taking testimony from a witness in a small home. Examination of the record shows that this testimony did not comprise any major part of the trial and that the generally public nature of the trial was preserved.

POINT III.

The Court did not err in permitting the Prosecuting Attorney to cross examine the defendant as to matters which might bear on the defendant's intent or which might have provided a basis for impeachment of the defendant. In any event no error can be predicated on such questions when the answers of the defendant thereto were entirely exculpatory.

The evidence submitted by the Court and complained of by the petitioner as a violation of his rights under the Fourteenth Amendment can be divided in three categories:

1. Evidence of the defendant's occupation.
2. Evidence of the defendant's conviction of violation of State and Federal law.
3. Questions relating to the possible involvement of the defendant in an incident of violence directed towards the Police Chief of Niles, Ohio.

With respect to the first category of evidence the defendant admitted that he was a gambler on a commercial basis and that he had a professional gambling game and he denied having the occupation of body guard. The defendant himself had testified on direct examination as to his various occupations including being a painting contractor and a partner in the trucking business with Willie

Mazza. Having opened the door on these matters defendant cannot be now heard to complain that the State made inquiry into his other occupations. The defendant wished to have the jury know his different lines of work and if some of these were properly before the jury then surely the other occupations were also proper subjects for cross examination. So far as being a body guard appellee knows of nothing illegal or blameworthy in this occupation.

As to the conviction for violation of Federal Rationing Laws, and conviction of shooting with intent to wound appellee believes that the law of this State permitting impeachment of any witness including the defendant by showing of his conviction of crime is too well settled to admit of citation or argument.

The final area of questioning cited by petitioner is that of the inquiry on cross examination into the possible involvement of the defendant in placing dynamite at the home of Police Chief Ross of Niles, Ohio.

It is well to remember that the defendant was charged with two counts of threatening to kill with intent to extort. Specific intent was therefore an element of two counts of the indictment. Indeed intent was more than a technical element. Under the evidence it might be regarded as the crux of the case since to a large extent the defendant agreed with the skeleton of facts surrounding the threats directed at Brady and Cicchini. The defendant admitted being at the Boam-Ferrera offices on the day of the alleged threats and admitted telling Brady he was "x." (R. 497). (Though he denied that this was a threat to kill and passed the matter off as a personal argument.)

Intent being a key issue in the case, the State was entitled by statute to prove any acts of the defendant which would tend to show his motive or intent, the absence of mistake or accident on his part or a scheme, plan or system

in doing an act. (O. R. C. 2945.59). This, of course, could be done by cross examination if possible.

Had the defendant admitted being involved in the bombing of a public official's home and had the motive been extortion or similar pressure as it usually is when acts of violence are directed against public officials then the evidence would have been competent for the purposes set forth in R. C. 2945.59.

It goes without saying that cross examination is often an exploratory process in which the questioner hopes to elicit matter which will be material and helpful to his cause. Every trial lawyer, however, has had occasion to discover to his sorrow that this goal is frequently frustrated by the answers of a hostile witness. Any extensive cross examination will be found to contain questions and answers which become "immaterial" by the negative answers of the witness. The extent to which such exploratory cross examination is permissible is a matter within the discretion of the trial judge. In the present case, as it happened, the defendant denied any voluntary or conscious participation in the bombing and in accordance with the usual rules the State was bound by his answers and the matter went no further. There was nothing inflammatory in the manner of questioning nor any indication that the counsel for the State entertained any particular belief with respect to the guilt or innocence of the defendant. The evidence then which went to the jury on this matter was wholly exculpatory. In fact defense counsel seized the opportunity presented by these questions to place before the jury the ordinary inadmissible results of a lie detector test and an apology from the victim, Chief Ross, for even questioning defendant on the bombing matter. (R. 542.) While on the subject of lie detectors counsel also elicited from the defendant a statement that he volunteered to take a

lie detector test on the Sewer Project matter and had been refused. It is difficult to see then how the defendant could have been prejudiced by these questions and answers.

In the case of *State v. Witsel*, 144 O. S. 190, the conviction was upheld although the prosecutor on cross examination had questioned the defendant as to his participation in other crimes. The defendant denied participation in these other crimes. Finding no error prejudicial to the defendant, the court said:

> "It will be noted that in the *Wagner* case the defendant had been obliged to discredit himself before the jury by admitting that he had been indicted for certain crimes, whereas in the instant case the defendant denied the imputations contained in the questions of counsel for the State, and, so far as the record goes, there is no evidence in support of those matters reflecting upon the character or conduct of the defendant. The question before this Court is whether the conduct of counsel for the State in putting these questions to the defendant was so prejudicial as to require a reversal of the judgment."

The Court then went on to cite the provision of G. C. Section 13449-5 now R. C. 2945.83[1] in finding that the asking of the questions did not in and of itself require reversal.

It may also be noted in this case that the questions asked could have formed the foundation for impeachment of the witness by F. B. I. agents that the defendant lied about his answers to questions posed by such Federal agents.

Finally the Supreme Court of the United States had occasion to consider this matter on similar facts in the

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[1] G. C. Sec. 13449-5 now R. C. 2945.83: Requiring affirmative proof in the proof in the Record that the accused was or may have been prejudiced thereby. See Appendix.

case of *Robert Sawyer v. U. S.*, 202 U. S., 150, 50 L. ed. 972. In this case the defendants had been convicted of a mutinous murder on the high seas. On cross examination by the District Attorney of one of the defendants who had voluntarily become a witness in his own behalf, questions were asked as to the conduct of the defendant-witness on a previous occasion on a different vessel in regard to which nothing had been said on examination of the witness in chief. The Court found the innocent answers of the defendant conclusive on the question of whether or not there had been any prejudice from this line of interrogation stating:

> "It is unnecessary in this case to inquire whether the cross examination was within the prescribed limits because the witness denied that he had any trouble or that he had ever tried to create any trouble, or that there was any insubordination on his part onboard the vessel, named. What he said in regard to the facts show that there was neither trouble or insubordination. The Government made no attempt to contradict the evidence on this subject and hence there could be no harm arising from the cross examination. There are some State authorities which hold that the error, if any, is not cleared by answer of the witness denying the charge, but we think the better rule is whereas, in this case, it is plain that there is no injury, the exception is not available."

POINT IV.

There was no violation of the petitioner's rights under the Fourteenth Amendment by virtue of an amendment to the indictment for such amendment did not change the nature of the crime charged and is permitted by statute. It was not complained of by the petitioner at any time and no prejudice has been shown or even suggested. Further any alleged error in this regard has not been properly preserved for the reason that the same has not been properly raised at any stage of the proceedings in the state courts below.

Subsequent to the arraignment of the defendant and prior to trial, the trial court permitted the State to amend the indictment with respect to Count three by adding words which stated that the crime upon which the defendant had been indicted by the Grand Jury, to wit: obtaining money by false pretenses, had been done in conspiracy with one Frank Cickelli. Such amendment is permitted in Ohio by statute.[1] It may be noted that this statute permits the amendment of the indictment even after the trial so that there is obviously no resubmission to the Grand Jury contemplated when an indictment is amended.

It must be emphasized that this amendment did not in any way change the identity of the crime charged. It remained the same both before and after indictment, i.e., obtaining money by false pretenses. Though the State intended to and did prove a conspiracy for the purpose of introducing the statements and acts of Cickelli, as a co-conspirator of the defendant in the obtaining of the money by false pretenses, the State's right to do so was not founded upon the change of indictment, but rather upon the general rules of evidence which, upon a theory of

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[1] O. R. C. Section 2941.30

mutual agency, permit the introduction of the acts and declarations of the co-conspirator in furtherance of the object or design of such conspiracy. Words added were therefore in no way essential either to the charging of the crime or the presentment of the state's case. Far from being prejudicial to the defendant, the amendment acted as a further specification of the crime and put the defendant on notice that a part of the state's case would be presented by means of the introduction of the acts and declarations of a co-conspirator.

The defendant at no time, by motion or otherwise, objected to the amendment, asked that the words be stricken or make any complaint whatsoever with regard to this proceeding.

Finally, the claim of error in amending the indictment without resubmission to the grand jury was not raised at any time during the proceedings in the State courts.[1]

Appellee has already set forth in his brief under Point I its contention with supporting legal authorities to the effect that the Fifth Amendment to the Constitution does not apply to the States and that there is no constitutional inhibition against proceeding to the trial of a criminal cause in a State court without the intervention of any grand jury at all. This contention applies with equal strength and validity to Point IV of the petitioner. Petitioner can not even suggest any manner in which he was prejudiced by the addition of words which did not change the identity of crime and merely acted as a sort of bill of particulars for his benefit.

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[1] Appendix, Appellant's Assignment of Errors in the Supreme Court of Ohio.

CONCLUSION.

It is respectfully submitted that the petition for a writ of certiorari in this case should be denied for the reason that it presents no substantial question involving a denial of petitioner's federal constitutional rights.

Respectfully submitted,

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APPENDIX.

STATUTES.

O. R. C. Sect. 2313.41—POINT I.—Array may be set aside.

A challenge to the array may be made and the whole array set aside by the court when the jury, grand or petit, was not selected, drawn, or summoned, or when the officer who executed the venire did not proceed as prescribed by law. No challenge to the array shall be made or the whole array set aside by the court, by reason of the misnomer of a juror; but on challenge, a juror may be set aside by reason of a misnomer in his name; but such challenge shall only be made before the jury is impaneled and sworn, and no indictment shall be quashed or verdict set aside for any such irregularity or misnomer if the jurors who formed the same possessed the requisite qualifications to act as jurors.

R. S. 5175—POINT I.—Array may be set aside.

A challenge to the array may be made and the whole array set aside by the court, when the jury, grand or petit, was not selected, drawn or summoned, or when the officer who executed the venire did not proceed as prescribed by law. But no challenge to the array shall be made or the whole array set aside by the court, by reason of the misnomer of a juror or jurors; but on challenge, a juror or jurors may be set aside by reason of a misnomer in his or their names; but such challenge shall only be made before the jury is impaneled and sworn, and no indictment shall be quashed or verdict set aside for any such irregularity or misnomer if the jurors who formed the same possessed the requisite qualifications to act as jurors.

O. R. C. 2941.55—Point I.—Plea in abatement.

Plea in abatement may be made when there is a defect in the record shown by facts extrinsic thereto.

O. R. C. 2941.59—Point I.—Waiver of defects.

The accused waives all defects which may be excepted to by a motion to quash or a plea in abatement, by demurring to an indictment, or by pleading in bar or the general issue.

O. R. C. 2941.08 (k)—Point I.—Certain defects do not render indictment invalid

(k) For other defects or imperfections which do not tend to prejudice the substantial rights of the defendant upon the merits.

O. R. C. 2319.26—Point II.—Deposition to be filed.

Every deposition intended to be read in evidence on the trial must be filed at least one day before the day of trial.

O. R. C. 2945.49—Point III.—Proof of defendant's motive.

In any criminal case in which the defendant's motive or intent, the absence of mistake or accident on his part, or the defendant's scheme, plan or system in doing an act is material, any acts of the defendant which tend to show his motive or intent, the absence of mistake or accident on his part, or the defendant's scheme, plan, or system in doing the act in question may be proved, whether they are contemporaneous with or prior or subsequent thereto, notwithstanding that such proof may show or tend to show the commission of another crime by the defendant.

O. R. C. 2945.83—Point III.—When new trial shall not be granted.

No motion for a new trial shall be granted or verdict set aside; nor shall any judgment of conviction be reversed in any court because of:

(A) An inaccuracy or imperfection in the indictment, information, or warrant, provided that the charge is sufficient to fairly and reasonably inform the accused of the nature and cause of the accusation against him;

(B) A variance between the allegations and the proof thereof unless the accused is misled or prejudiced thereby;

(C) The admission or rejection of any evidence offered against or for the accused unless it affirmatively appears on the record that the accused was or may have been prejudiced thereby;

(D) A misdirection of the jury unless the accused was or may have been prejudiced thereby;

(E) Any other cause unless it appears affirmatively from the record that the accused was prejudiced thereby or was prevented from having a fair trial.

O. R. C. 2941.30—Point IV.—Amending an indictment.

The court may at any time before, during, or after a trial amend the indictment, information, or bill of particulars, in respect to any defect, imperfection, or omission in form or substance, or of any variance with the evidence, provided no change is made in the name or identity of the crime charged. If any amendment is made to the substance of the indictment of information or to cure a variance between the indictment or information and the proof, the accused is entitled to a discharge of the jury on his motion, if a jury has been impaneled, and to a reason-

able continuance of the cause, unless it clearly appears from the whole proceedings that he has not been misled or prejudiced by the defect or variance in respect to which the amendment is made, or that his rights will be fully protected by proceeding with the trial, or by a postponement thereof to a later day with the same or another jury. In case a jury is discharged from further consideration of a case under this section, the accused was not in jeopardy. No action of the court in refusing a continuance of postponement under this section is reviewable except that motion to and refusal by the trial court to grant a new trial therefor, and no appeal based upon such action of the court shall be sustained, nor reversal had, unless from consideration of the whole proceedings, the reviewing court finds that the accused was prejudiced in his defense or that a failure of justice resulted.

APPELLANT'S ASSIGNMENT OF ERRORS IN THE SUPREME COURT OF OHIO.

1. Defendant-Appellant was deprived of his rights under Article I, Section 5 of the Constitution of the State of Ohio and the Sixth Amendment of the Constitution of the United States of America for the reason that the panel of jurors drawn to serve as grand jurors was not selected according to law.

2. The verdict and judgment of the jury was not substantiated by sufficient evidence and was contrary to the weight of the evidence.

3. The trial court erred in permitting the introduction by the State of evidence of conversations between witnesses and third parties at which Defendant-Appellant was not present, with no proper foundation laid or proof of conspiracy.

4. The trial court erred in sustaining the motion of the prosecution in moving the court and jury to the home of the State witness, Walter Pestrak, and ordering the court, jury and defendant to said home, over the objection of the Defendant-Appellant.

5. The trial court erred in permitting the Prosecuting Attorney, over the objection of the Defendant-Appellant, to cross-examine the Defendant-Appellant as to matters completely collateral and not associated in any way with the crimes charged in the amended indictment.

6. The trial court erred in its charge to the jury.

7. Misconduct of the Prosecuting Attorney regarding his comments of the case, while appeal was pending.

8. The Court of Appeals erred in affirming the judgment and sentence of the trial court.